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THE IDEA OF A BRITISH BILL OF RIGHTS

by **Robert Blackburn**, London

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may create an environment where the measures allegedly taken with reference to the protection of workers primarily seek to prevent undertakings from lawfully establishing themselves in other EEA States".⁶¹ In the case at hand it appeared that the boycott could even be detrimental to the situation of *Holship's* employees.⁶²

IV. Conclusions

Paul Mahoney's statement, referred to at the beginning of my contribution, continues: "The journey made by human rights down the short road from Strasbourg to Luxembourg, together with the warm welcome they received there from the Luxembourg judges, is a fascinating story ... [H]uman rights took up residence in Luxembourg under the head of 'fundamental rights of the European Communities' and found themselves a second home on the European judicial level, not their main European judicial residence perhaps but a well-used secondary residence."⁶³ *Mutatis mutandis*, this also applies to the interpretation of the EEA Agreement by the EFTA Court. The latter has not shied away from tackling areas of debate. And it has on essential issues given more weight to Strasbourg case-law than to the case-law of its Luxembourg sister court. It is thus all the more important that the dialogue between the EFTA Court

and the European Court of Human Rights should not be a one-way street. In *Ališić and Others* the Strasbourg Court referred to the EFTA Court's *Icesave* judgment.⁶⁴

Finally, while it is the Luxembourg Courts which are primarily engaged in the supervision of EU and EEA law,⁶⁵ the partial blurring of dividing lines between Strasbourg and Luxembourg has proven to have benefited, in particular, those who create wealth in the European Single Market – in the EFTA Court's words, the market actors.⁶⁶ At the very least, fundamental rights provide a guiding line as to the fairness of market-access rules. This merits being borne in mind during the recasting of the relationship between the United Kingdom and the European Union after Brexit.

⁶¹ *Ibid.*, para. 125.

⁶² *Ibid.*, para. 126.

⁶³ Paul Mahoney (*supra* note 1), p. 73.

⁶⁴ EurCourtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, no. 60642/08, judgment of 16 July 2014, paras. 70 et seq.; referring to E-16/11, *EFTA Surveillance Authority v. Iceland*, [2013] EFTA Ct. Rep. 4.

⁶⁵ See Alan Rosas (*supra* note 4), p. 167.

⁶⁶ *Deveci* (*supra* note 18), para. 64.

THE IDEA OF A BRITISH BILL OF RIGHTS

by Robert Blackburn, London

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I. Introduction

The British Conservative Party, currently in government, has declared its intention to establish a national Bill of Rights at the same time as repealing the Human Rights Act 1998 that incorporates the European Convention on Human Rights into domestic law. Its one short paragraph on the matter in its policy programme delivered in the Queen's Speech to Parliament on 18 May 2016 was expressed in the following terms:

"My government will hold a referendum on membership of the European Union. Proposals will be brought forward for a British Bill of Rights. My ministers will uphold the sovereignty of Parliament and the primacy of the House of Commons."¹

This typifies the conflation that has emerged in recent times of the idea of a British Bill of Rights with attitudes towards Europe generally, and with ambiguous concepts about national or parliamentary sovereignty in particular.

This article analyses the government's proposal² for a British Bill of Rights in its historical and political context.

It provides a study of the reasoning and pressures behind the idea of a Bill of Rights as they have evolved, developed, and changed over the past fifty years. The significance of the Bill of Rights debate is discussed for what it reveals about Britain's political and constitutional affairs more widely. In a final section, the conclusions and views of the author are given on how the proposed British Bill of Rights is best conceived, formulated and designed for today and the future.

II. Incorporation of the ECHR and a Bill of Rights

Much of the controversy surrounding, and antagonism towards, the Human Rights Act in British public discourse has been driven simply by perceptions of it being a European-inspired instrument (even though the articles of the Convention were principally drafted by UK officials in 1949-50³) and resentment at foreign interference in the

* Robert Blackburn, QC, LLD; Professor of Constitutional Law, King's College London; UK National Correspondent to the Council of Europe, Directorate of Human Rights, 1983-2008. The present text is a written contribution to the Colloquy held in honour of Paul Mahoney in September 2016 in the Human Rights Building in Strasbourg, see above at p. 241.

¹ *Lords Hansard*, 18 May 2016, cols. 3-4; see also 27 May 2015, cols. 5-7. On the government's plans to repeal the Human Rights Act as part of its enactment of a Bill of Rights see section IX below. The referendum referred to was subsequently held on 23 June 2016 and resulted in a 52:48 % decision to leave the EU.

² At the time of writing, September 2016, no draft legislation on the proposal had been prepared and presented to Parliament.

³ On the drafting of the ECHR see Robert Blackburn and Jörg Polakiewicz (eds.), *Fundamental Rights in Europe: The ECHR and its Member States 1950-2000* (2001), esp. pp. 936-946.

UK's domestic affairs. This attitude of mind, commonly referred to in political discourse as "Euro-scepticism" or "Euro-phobia", has been a deeply divisive force in British politics, cutting across all parties at various times since 1972,⁴ and culminated in the shock of the referendum result to leave the European Union on 23 June 2016.

It was a strategic mistake of the Labour government entering office in 1997 to abandon the party's earlier programme of constitutional reform prepared under the leadership of John Smith in 1992-94 and to confuse the idea of a British Bill of Rights with incorporation of the ECHR. The party's 1993 document entitled *A New Agenda for Democracy* had well-advisedly set out a two-stage process of human rights reform, being to incorporate (give formal legal recognition of) the ECHR in domestic law, and then proceed to enact a homegrown Bill of Rights. This was to be approached in a comprehensive, joined-up manner, pointing in the direction of the longer-term aim of a written UK constitution, one in which the Bill of Rights already on the statute book would find a natural home as forming part of the fundamental law of the state. Instead, the Blair administration chose to adopt an ad hoc approach to political and constitutional reform, confused the two concepts of ECHR incorporation and a Bill of Rights, and dropped its earlier pledge on a Bill of Rights.⁵

Incorporation of the ECHR into domestic law (which is not a specific requirement of the Convention⁶) is not the same thing as a constitutional Bill of Rights: they are essentially separate and distinct concepts, both legally and politically. The incorporation of principles contained in an international treaty to which a state has become a signatory is common elsewhere, and is automatic on the ratification of a treaty under the constitutional law of most other European states.⁷ Treaties, as incorporated, allow for explicit judicial recognition of international obligations in domestic law, and disputes as to the meaning of those obligations may be subject to a right to appeal to an international court, such as the Court of Human Rights at Strasbourg under the terms of the ECHR. A country's Bill of Rights, by contrast, is drafted specifically and exclusively for internal application within a country's constitutional system, usually forming a body of fundamental law within the state, and there is no external judicial appeal on the meaning of its provisions. Such a document sets out the rights and freedoms of its citizens, attuned to the indigenous culture of its particular society. A national Bill of Rights raises the question of the balance of power between the three branches of state, executive, legislature and judiciary, and such a document usually possesses a special status and priority in law over other legal measures, as well as a special parliamentary process for changing its content and details.

This distinction is of a great importance. Because the Labour government treated incorporation of the ECHR and the Human Rights Act as though it were a Bill of Rights, it fell into the fatal political trap of associating it with Europe and the idea that a foreign European court was dictating to Parliament and the British people what their rights and freedoms are and should be. The better approach would have been to incorporate the ECHR as an interpretative document only,⁸ leaving the issues and formulation of actionable rights in the courts, and their status and priority in law, to the separate enactment of a domestic British Bill of Rights conducted shortly afterwards.

III. British Constitutionalism

For over half a century, heated debates in Britain have been held in Parliament, within the political parties, and at our Universities, on the desirability or otherwise of a Bill of Rights. A characteristic of much of the debate has

been its domination by lawyers, and much of what follows in this article considers these in some detail. But there are good social and political arguments for a Bill of Rights, particularly for their educative value and as points of reference in terms of political accountability. As Harold Laski once said,

"There is a real value in Bills of Rights which it is both easy, and mistaken, to underestimate. Granted that the people are educated to the appreciation of their purpose, they serve to draw attention, as attention needs to be drawn, to the fact that vigilance is essential in the realm of what Cromwell called fundamentals. Bills of Rights are, quite undoubtedly, a check upon possible excess in the government of the day."⁹

Fundamental to understanding the Bill of Rights debate in Britain is to appreciate the distinctive elements of British constitutionalism, in particular its unwritten (meaning uncodified) nature, its dogma of parliamentary sovereignty (meaning the legal supremacy of an Act of Parliament), and its partial acceptance of the doctrine of separation of powers (with a fused executive-legislature and independent but subordinate judiciary). These elements were established as the outcome of the constitutional conflicts of the seventeenth century, leaving the Crown and Parliament as the axis of the constitution down to the present day. It is also important to appreciate that the three legal systems¹⁰ of the United Kingdom have a dualist approach to international law, one that is firmly buttressed by those championing the sovereignty of the British Parliament.

The English document known as The Bill of Rights 1688, parts of which are still on the statute book, is not, and never was, a charter of individual and minority rights and freedoms in the modern democratic sense. It formed part of the constitutional settlement under which William and Mary assumed the Throne after the enforced abdication of King James II, proclaiming the legal and constitutional primacy of an Act of Parliament over all matters in the state including the ancient common law prerogative powers of the Crown. The parliamentarians and common lawyers of the day re-invented and invoked Magna Carta from medieval times to suit their ideological claims for limited government and freedom from arbitrary rule. When two centuries later the influential Victorian jurist A. V. Dicey came to write the section on civil liberties in his book on *The Law of the Constitution*, formulated largely in response to constitutional developments in America and France, he expressed these British concepts through the terminology of "the rule of law".

"The 'rule of law'... may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the

⁴ On divisions within both Labour and Conservative parties on Europe, see Vernon Bogdanor, "Learning from History: The 1975 Referendum on Europe", Gresham College Lecture, 23 May 2016.

⁵ See further below at pp. 315-316.

⁶ See for example *Observer and Guardian v. United Kingdom* (26 November 1991, 13 HRLJ 7 (1992)); and for discussion, Robert Blackburn and Jörg Polakiewicz, *Fundamental Rights*, *supra* note 3, chapter 2 especially pp. 31-33.

⁷ This is not the case in the UK with its dualist approach to the legal status of treaties, so that an Act of the UK Parliament is required to give their domestic legal effect: see Robert Blackburn and Jörg Polakiewicz, *Fundamental Rights*, *supra* note 3.

⁸ This would strengthen the status of the Convention as a persuasive authority in the interpretation of uncertain or ambiguous provisions or principles in statute and common law, including in judicial review proceedings.

⁹ *Liberty in the Modern State* (1937), p. 76.

¹⁰ i.e. England and Wales, Scotland, and Northern Ireland.

consequence of the rights of individuals, as defined and enforced by the courts... There is in the English constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists.”¹¹

It was these ideas, especially absence of arbitrary authority and equality before the law, that were said to underpin and guarantee an English citizen's rights and freedoms; and in his view it did so far more effectively than any Bill of Rights as in America or special system of administrative law as in France. Furthermore, “the source of our liberty is not in laws of institutions, but in the spirit of a free people”, declared Sir Ivor Jennings in 1940, another of the great constitutional law professors of times past.¹²

The dominant legal and political thinking in Britain until quite recently, therefore, eschewed the concept of positive and actionable rights, laying emphasis on a basic principle that everyone was free to do whatever they liked unless it transgressed common law or statutory limitations, and the provision of judicial procedures for guaranteeing liberty. The prevalent view was that declarations of rights were the sign of an immature or defective civil society, whereas Britain was regarded as having produced a near-perfect constitution through a long evolutionary process based upon respect for the rule of law. Declarations of rights were associated with revolutionary France and the Napoleonic codification of laws that was at odds with the Westminster system of parliamentary government and the English common law tradition. Furthermore, “a Bill of Rights is not an automatic guarantee of liberty; its efficacy depends on the integrity of the institutions which apply it, and ultimately on the determination of the people that it should be maintained”, wrote the Home Office in a discussion paper on human rights legislation in 1976.

IV. Early Ideas on a Modern Bill of Rights

However starting in the 1960s, social and political attitudes towards authority and its public institutions began to change in the wake of the Second World War. This was driven by the realisation that Britain was no longer a great world power, a decline in its national economy, and the evaporation of its distinctive class structure of society and with it diffused habits of deference. The country's constitutional arrangements which had been exported around the world to its former colonies, sometimes with charters of fundamental rights and freedoms included, was no longer as sacrosanct as it had been before 1945. A rising movement across the political parties and in legal professions was that the institutions and processes of the constitution and its integral parts for promoting democracy and civil liberty were failing to keep apace with social and technological developments and were now in need of modernisation and reform.

The earliest advocates drew attention to the early constitutional warnings of J. S. Mill about the “tyranny of the majority” being an inherent risk in the newly emerging democratic arrangements of Britain and the west, necessitating new safeguards for individual and minority rights and freedoms.

“Such phrases as ‘self-government’ and ‘the power of the people over themselves’, do not express the true state of the case. The ‘people’ who exercise the power are not always the same people with those over whom it is exercised; and the ‘self-government’ spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active part of the people – the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, may desire to oppress a part of their number, and precautions are as much needed against this as against any other abuse of power. The limitation, therefore, of the power of government over individuals loses none of its importance when the holders of power

are regularly accountable to the community, that is, to the strongest party therein”.¹³

In 1974 Lord Scarman, a former chairman of the Law Commission and later Law Lord, developed this theorising into a critique of the doctrine of parliamentary sovereignty itself, the fundamental dogma of British constitutionalism and legislative supremacy of Parliament, setting out the view that a new constitutional settlement was needed to protect civil liberties by way of entrenched provisions in the field of fundamental human rights.¹⁴ Two years later, the first high-profile call for a new constitution with an entrenched Bill of Rights came in a televised BBC lecture by Lord Hailsham, a former Conservative party chairman and later Lord Chancellor, saying, “Surely if it is to be worth the paper it is written on, a Bill of Rights must be part of a written constitution in which the powers of the legislature are limited and subject to review by the courts”.¹⁵ Then the same year, Lord Wade introduced a Bill of Rights Bill into the House of Lords, identical in form to a similarly named Bill presented to the House of Commons by Alan Beith the previous year. The long title of these were, “A Bill to declare the inalienable rights and liberties of the subject”: a curious use of the term “subject” to foreign observers, but one which has been – and remains – customary in official terminology because of the continuing existence of the Crown and the political mythology that surrounds it.

This led directly to a Select Committee inquiry into the desirability of a Bill of Rights, and if thought desirable, the form it should take.¹⁶ By a six to five majority the Committee was in favour of a Bill of Rights, and all agreed that, “If there was to be a Bill of this kind, the only feasible way of proceeding was to rest on the European Convention on Human Rights”. Their primary reason for using the articles of the ECHR was not to align Britain with the public international law of universal human rights, or European civilised values, but simply because members – rightly or wrongly – did not believe it was practical politics to believe the political parties could ever agree on what any other form of wording for the rights and freedoms of the individual should be (“a fruitless exercise”); and anyway in their thinking, the ECHR had been drafted by British lawyers on the basis of rights recognised as existing in the UK, so surely they were suitable for a British Bill of Rights.¹⁷

A specially interesting part of the Select Committee's report is its ideas on entrenchment, in other words whether and if so how the Bill of Rights might be given a status in law superior to ordinary parliamentary enactments, lay down a special procedure for any future amendment, and

¹¹ See *The Law of the Constitution* (1885; 10th ed. 1985), pp. 39–41, 87–91.

¹² See *The British Constitution* (1940; 5th ed. 1966), pp. 203–9.

¹³ J. S. Mill, *On Liberty* (1859; Pelican ed., 1979), p. 62.

¹⁴ Sir Leslie Scarman, *English Law – The New Dimension* (Hamlyn Lectures, 1974).

¹⁵ Lord Hailsham, *Elective Dictatorship* (Dimbleby Lecture, 1976).

¹⁶ House of Lords, Select Committee on a Bill of Rights, HL (1977–78) 176.

¹⁷ Sir David Maxwell-Fyfe (later Lord Kilmauir and UK Lord Chancellor) was chairman of the Council of Europe's Consultative Assembly's Legal and Administrative Questions Committee that made the original recommendations on the content of the Convention submitted to the Committee of Ministers, and it was Sir Oscar Dowson (a retired legal adviser at the UK Home Office) who drafted the wording of articles 2 to 17 (drawing heavily on the Universal Declaration) which was accepted by the Committee almost verbatim. See Robert Blackburn, “The United Kingdom”, Chapter 36 in Robert Blackburn and Jörg Polakiewicz (eds.), *Fundamental Rights in Europe: The ECHR and its Member States* (2001).

thus empower the judiciary (or a special court established for the purpose) to invalidate any provisions in ordinary later statutes contrary to the human rights articles in the Bill. The Committee flatly rejected any such proposition, not on grounds of political logic or reasoning, but simply because it accepted the opinion of their specialist adviser that it was a legal impossibility. "One thing is clear", the Committee said in its report, "there is no way in which a Bill of Rights could be made immune altogether from amendment or repeal by a subsequent Act."¹⁸ In reaching this conclusion, their legal adviser Mr G. Rippengal drew on judicial precedents such as *Vauxhall Estates v. Liverpool Corporation* (1932) and *Re Ellen Street* (1934)¹⁹ and referred to Professor Dicey who had proclaimed parliamentary sovereignty to mean, "first, the power of the legislative to alter any law, fundamental or otherwise, as freely and in the same manner as other laws; secondly, the absence of any distinction between constitutional and any other laws; thirdly, the non-existence of any judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional".²⁰ In Mr Rippengal's view, any entrenching article in a Bill of Rights would be inoperative, since any later offending statutory provision enacted after its passage would always be upheld by the courts.

In the writer's view these ideas were, and are, misplaced. If the UK Parliament – especially with all party support and/or a referendum in support – chose to enact a new constitutional arrangement between itself and the judiciary, it is very unlikely the courts would refuse to accept it. As I have suggested elsewhere,²¹ two legal devices might be employed in support: firstly the terms of judicial office be altered by general agreement to include a declaration to uphold the terms of the Bill of Rights,²² and secondly the Supreme Court issuing a Practice Statement on the special legal status and priority to be afforded to the Bill of Rights. However, a better form of entrenchment for a stand alone Bill of Rights in the UK would be a qualified form of entrenchment, similar to that adopted by the Canadian Parliament for its country's Charter of Rights and Freedoms.²³ For UK purposes, this would involve the Bill of Rights containing a provision that it was to prevail over all subsequent enactments except those where the later Act of Parliament expressly states that it shall operate notwithstanding anything in the Bill of Rights.

V. Growing Support during the Thatcher Years

During the Thatcher years of the 1980s a series of legislative attempts was made by backbench peers and MPs to enact a Bill of Rights. Whilst standing no chance of success in reaching the statute book without government support, these Private Members Bills generated considerable debate, disclosing the ideas underpinning support or opposition to such a measure. Throughout, Margaret Thatcher, never a constitutional reformer herself (though ironically a radical in reforming the public services and civil service), remained resolutely opposed to both the idea of a Bill of Rights and incorporation of the ECHR²⁴ (though again ironically, her first election manifesto in 1979 had contained a pledge to hold all party talks on a "possible Bill of Rights",²⁵ a policy her close ally and intellectual partner Keith Joseph actively advocated²⁶).

A case study of the 1983-87 Parliament, a formative period in the history of the debate, is instructive. The Bills introduced and debated included the European Human Rights Convention Bill (1983-84 session),²⁷ the Human Rights and Fundamental Freedoms Bill (1985-86 session),²⁸ and the Human Rights Bill (1986-87).²⁹ A primary concern expressed by supporters was the dramatically changed circumstances in political and public life and massively extended scale of government intervention since the Victorian era when Dicey and the classic works on the British constitution were

propounding the doctrines of parliamentary sovereignty and the rule of law. Thus in the opinion of David Steel, now Lord Steel and former leader of the Liberal Party,

"When I was a student of constitutional law at Edinburgh University I was brought up on the classic doctrines of Dicey and the supremacy of Parliament. In my 20 years in the House [of Commons] I have come to recognise that the need for the Bill arises precisely because many of us feel that Parliament on its own can no longer adequately protect our citizens. The increase in the executive arm of Government and in the number of areas of Government activity, under Governments of all parties, and the increasing complexity and speed of modern life have meant that the individual is in need of greater protection, but is afforded less... The sheer scope of Government activity and the bureaucracy and technology that support it have increased exponentially over the past century since Dicey was writing his learned works. Inevitably, the individual is at an increasing disadvantage in the massive system of social management and is ultimately out of control, which is inherent in the world of computer files, satellite surveillance and telephone tapping".³⁰

During this period, the number of complaints of human rights violations going to the European Court of Human Rights from Britain started to increase dramatically, including some much publicised cases where the country was subsequently found to have been in breach of the Convention.³¹ This prompted numerous parliamentarians

¹⁸ Para. 14.

¹⁹ [1932] 1 KB 733 and [1934] 1 KB 590 respectively.

²⁰ A.V. Dicey, *The Law of the Constitution* (1885; 9th ed. 1939), p. 91.

²¹ Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (1999), "Methods of Entrenching a UK Bill of Rights", pp. 55-67.

²² See also H.W.R. Wade, *Constitutional Fundamentals* (1980), p. 37.

²³ Constitution Act 1982 (79), Schedule B, Part I, section 33 (Canada).

²⁴ "We believe it is for Parliament rather than the judiciary to determine how these [human rights] principles are best secured", *Commons Hansard*, 6 July 1989, cols. WA251-2. Her successor John Major as Conservative leader and Prime Minister expressed a similar view: see *Commons Hansard*, 15 January 1993, col. WA822.

²⁵ Conservative Party Election Manifesto 1979, p. 21: "There are other important matters, such as a possible Bill of Rights... which we shall wish to discuss with all parties".

²⁶ Keith Joseph, *Freedom under the Law* (Conservative Political Centre, 1975).

²⁷ HC (1983-84) 73 presented by Robert MacLennan.

²⁸ HL (1985-86) 21 presented by Lord Broxbourne, with active support from Lord Scarman.

²⁹ HC (1986-87) 19 presented by Sir Edward Gardiner.

³⁰ *Commons Hansard*, 6 February 1987, cols. 1231/2.

³¹ High profile cases around this time included *Campbell and Cosans*, 1982, 3 HRLJ 221 (1982) (corporal punishment/caning of state school children, leading to Education No. 2 Act 1986, section 47); *Silver and others*, 1983, 4 HRLJ 227 (1983) (interference with prisoners' correspondence, leading to Prison (Amendment) Rules 1983, S.I. 1983/568); *Campbell and Fell*, 1984, 6 HRLJ 255 (1985) (restrictions on prisoners' legal representation and conduct of disciplinary proceedings, leading to new procedural rights for prisoners including publicly-funded representation); *Malone*, 1984, 5 HRLJ 319 (1984) (absence of controls over state telephone-tapping, leading to Interception of Communications Act 1985); *Abdulaziz, Cabales and Balkandali*, 1985 (sex discrimination in immigration, leading to Statement of Changes in Immigration Rules, laid before Parliament on 15 July 1985, HC 503); *Gillow*, 1986 (Guernsey removal of pre-existing home occupation rights, leading to damages and cessation of housing restriction); *Weeks*, 1987 (arbitrary detention of mentally disorders offenders serving life sentences, leading to government statement that Court of Appeal henceforth unlikely to impose life sentences in similar cases); *O, H, W, B and R (Parental Access)*, 1987 (restrictions/denial of parents' access to, and independent legal review of, children compulsorily taken into state care, leading to new code of practice and Children Act 1989, sections 22 and 34).

to support a Bill of Rights, by decrying having to go to the Strasbourg court to obtain redress for individual grievances on human rights grounds when in their view the British courts were more appropriate for deciding such matters. For example, on the better qualifications of UK judges, two MPs commented, "They [the judges of the Human Rights Court] need have no legal qualifications" (Mr Hanley), and "It is a purely political court" (Mr Budgen).³² This link with the European Court of Human Rights served to further conflate ideas for a Bill of Rights with incorporation of the ECHR into domestic law. On the need to limit cases going to Strasbourg, one Member said,

"It would help the image of Britain if those rights were brought into our law, because fewer cases would be ruled admissible by the court [at Strasbourg], to the humiliation of this country. We have been ruled against in twice as many cases as any other country in Europe. That is a national humiliation. We would not face that if we could pursue rights in our own courts in our own way. That is a major practical argument."³³

This idea that incorporating the ECHR would stem the rising tide of UK cases going to Strasbourg reappeared as part of the government's reasons for the Human Rights Act 1998, though in fact the number and frequency of cases continued to grow, possibly because the net effect of the Act was to promote even wider awareness and therefore litigiousness in the population at large and the legal profession, most of whom until the 1990s except a few specialist practitioners were barely aware of the ECHR or its relevance to their everyday work.

Opposition to a new Bill of Rights during this Parliament relied principally on traditional attitudes towards the British constitution, especially where any enhanced powers to the judiciary were being proposed. For Lord Denning, a former Law Lord and Master of the Rolls, this "offends all our constitutional principles". He went on to add that any charter of rights in the UK would trigger "a myriad of cases by a lot of crackpots".³⁴ Above all, it was a perceived fear of politicising the judiciary that was cited in opposition to a Bill of Rights. According to Sir Patrick Mayhew, later Attorney General,

"The judiciary must be seen to be impartial. More especially, as far as practicable it must be kept free from political controversy. We must take great care not to propel judges into the political arena. However, that is what we would do if we asked them to take policy decisions of a nature that we ought properly to take ourselves and which under our present constitution we do take. We would increase that danger if we required or permitted them to alter or even reverse decisions taken by Parliament. For a long time I have felt that herein lies the key to the general issue that we are debating."³⁵

A more subtle argument employed against a Bill of Rights in the UK is that it would have the net effect of diminishing the role of Members of Parliament in defending the civil liberties of their constituents and making representations to ministers on their behalf for redress. Alexander (later Lord) Carlisle QC put this point well in the House of Commons, saying,

"I find it annoying when I go to a Minister to make representations on behalf of my constituents only to be told, 'There is nothing that I can do about that, because it is up to the courts or a tribunal to provide a remedy'. It is annoying when I have a detailed and difficult case involving my constituents and I want to refer it to the ombudsman and he says, 'Your constituent has a theoretical remedy by taking it through the courts or to a tribunal. I cannot investigate'. There is a danger that the Bill of Rights may well become an excuse for people to say that certain matters should not be resolved in the House but that the individual involved should take it outside and pursue it through the courts".³⁶

VI. Labour Ideology on a Bill of Rights

Generally speaking, opposition parties tend to be fonder of constitutional reform ideas than governments for the simple reason that strengthening the constitution almost always means weakening or imposing new limitations upon executive action. The defeat of the Labour Party at the British general elections in 1983, 1987 and 1992 produced a sense of desperation and a new willingness to embrace political reforms that had in earlier times seemed irrelevant to its core objectives in the field of social and economic affairs. In 1992 one of the first steps of the party's new and widely respected leader John Smith, a barrister and Queen's Counsel, was to champion the cause of radical constitutional reform, including incorporation of the ECHR into domestic law and a national Bill of Rights, pointing in the direction of a written UK constitution:

"Are we going to limp into the 21st century on a constitution built for the 19th? ... We need a new constitution for a new century ... We must modernise our system of government so that it is underpinned by the specific recognition of individual rights. The time has come when we should commit ourselves to a Bill of Rights."³⁷

Smith immediately commissioned a comprehensive policy review on the constitution, resulting in its report, *A New Agenda for Democracy: Labour's Proposals for Constitutional Reform*. That review proved to be a significant turning point in Labour Party thinking, not only on constitutional reform generally but on human rights reform in particular. It proposed a two-stage approach to a Bill of Rights: firstly, the European Convention on Human Rights should be incorporated into UK domestic law; then second, work should begin on developing a constitutional Bill of Rights indigenous to the UK. As Labour's report concluded,

"The incorporation of the European Convention on Human Rights is a necessary first step ... [but] it is not a substitute for our own written Bill of Rights ... There is a good case for drafting our own Bill of Rights".

This second stage of reform, the report recommended, would involve "the establishment of an all-party commission that will be charged with drafting the Bill of Rights and considering a suitable method of entrenchment. This should report to Parliament within a specified and limited period of time."

John Smith tragically died from a heart attack in 1994, and it was left to Tony Blair as his successor as Labour leader to carry forward Smith's legacy in the field of constitutional affairs. In his leadership election statement in 1994, Blair endorsed the commitment "to entrenching clear rights for every citizen in a Bill of Rights for Britain". Later the same year at his first party conference as leader, he promised that in government he would put forward "the biggest programme of change to democracy ever proposed by a political party", involving as one of its primary tasks, "every citizen to be protected by fundamental rights that cannot be taken away by the state or their fellow citizens enshrined in a Bill of Rights". The collaboration

³² *Commons Hansard*, 6 February 1987, col. 1236. This of course is incorrect: under ECHR article 21 appointed judges "must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence".

³³ *Commons Hansard*, 6 February 1987, col. 1240.

³⁴ Vol. 469, cols. 171-172; to which Lord Scarman replied that the UK judiciary particularly in the field of judicial review "have a long experience of dealing with cranks. We are paid to do that".

³⁵ *Commons Hansard*, 6 February 1987, col. 1267.

³⁶ *Commons Hansard*, 6 February 1987, col. 1262.

³⁷ *A Citizens' Democracy* (speech, 1 March 1993).

he forged with the Liberal Democrats prior to the 1997 election (involving a Joint Consultative Committee on Constitutional Reform in 1996-97, and after the 1997 election that Labour won by a large overall majority a special Cabinet Committee comprising a similar Joint Consultative Committee with senior Liberal Democrats on policy issues of joint interest) reinforced this objective, since the adoption of a constitutional Bill of Rights had been settled Liberal Democrat policy since the 1980s.

However in 1996 as the pending general election approached, Tony Blair and his key Shadow Cabinet members decided to quietly drop the party's earlier commitment to a Bill of Rights.³⁸ Instead of his earlier rhetoric on human rights reform, the Labour election manifesto now stated,

"Citizens should have statutory rights to enforce their human rights in the UK courts. We will by statute incorporate the European Convention on Human Rights into UK law to bring these rights home and allow our people access to them in their national courts. The incorporation will establish a floor, not a ceiling, for human rights. Parliament will remain free to enhance these rights, for example by a Freedom of Information Act."³⁹

There was no mention of a complementary and subsequent Bill of Rights. It seems that Tony Blair was principally concerned with his management and delivery of a programme for government, and he regarded the hurdle of a constitutional Bill of Rights as too ambitious and fraught with difficulties, with little benefit either to himself or the government in electoral terms. This then left the Human Rights Act that emerged from the Home Office under Jack Straw's stewardship a year later half-baked from the comprehensive programme of reform drawn up under John Smith, and a compromise of differing interests in terms of its UK and European political geography. If the Human Rights Act was to be regarded as a British Bill of Rights in itself,⁴⁰ therefore requiring no further documentation of such a name, it fell short of the essential characteristic of asserting British national values. It thus ended up falling between two stools, being constantly criticised by the Euro-sceptic lobby in British political and parliamentary life.

VII. Ideas and Pressures Shaping the Human Rights Act

Once in office after the 1st May 1997 general election that gave Labour a 179 seat majority in the House of Commons, the new Cabinet had to choose which proposals among its constitutional reform agenda to prioritise and deal with in its first annual session of Parliament.⁴¹ The two selected were devolution, regarded as "unfinished business" from the 1970s (leading to the Scotland Act 1998, Government of Wales Act 1998, and Northern Ireland Act 1998), and incorporation of the European Convention on Human Rights (which became the Human Rights Act 1998).

Over the summer of 1997, intense discussions on the form and content of the Human Rights Bill took place within the Home Office, and deliberations were held with a task force of special interest groups, orchestrated by Jack Straw and his advisers on the shaping of the legislation. A public consultation on the subject had already been conducted within the previous year whilst in opposition through a discussion paper entitled *Bringing Rights Home*. Perhaps there is never complete uniformity of purpose or reasoning behind any major measure of political or constitutional reform, but in the case of the Human Rights Bill there were certainly disparate pressures that led to its particular form and content. Among them in the shaping of the Bill were political short-termism and an ad hoc approach to constitutional reform, instead of the coherent ideological strategy necessary for the type of constitutional settlement

for the twenty-first century that had been envisaged earlier by John Smith.

The key element in the Human Rights Act 1998⁴² most proximate to a Bill of Rights was that human rights became actionable in the domestic courts, and a judicial remedy could be given to anyone in the UK found to have been a victim of a human rights violation. Unlike a normal Bill of Rights in an entrenched constitution however, the courts were given no power to invalidate any legislative measure that violates their human rights, nor provide a remedy to victims of such legislative abuse, thus preserving the doctrine of parliamentary sovereignty. All the courts may do is make a declaration that in its opinion the legislation is incompatible with the European Convention on Human Rights, and the government at its political discretion may consider whether to reform or correct the offending piece of legislation. In other words, the Act provides for the courts to go through the motion of judicial review of primary legislation, but without conferring the reality of actual judicial control, leaving litigants frustrated and it to the prerogative of politicians to correct the legal incompatibility with ECHR articles in whatever way suited it best, usually minimally, and in a special fast-track law-making process set out in the Act that allows for no amendment by Parliament.

The international character of the Human Rights Act is emphasised by the courts being directed to interpret domestic legislation and develop the common law (ss.2 and 3) in a manner consistent with the articles of the ECHR and rulings of the European Court of Human Rights, and its provision for the appointment of judges of the European Court of Human Rights (s.18). As to whether the Human Rights Act should be viewed as actually "incorporating" or simply giving "further effect" to the articles of the ECHR, a curious exchange of views on the matter was expressed during the House of Lords debates on the Bill. The minister responsible for piloting the Bill through the House, the Lord Chancellor Lord Derry Irvine, emphatically denied that the Bill incorporated the ECHR articles into UK domestic law, when to most people's minds that was precisely what the Bill did.

"The Bill as such does not incorporate Convention rights into domestic law... I have to make this point absolutely plain. The European Convention on Human Rights under this Bill is not made part of our law. The Bill gives the European Convention on Human Rights a special relationship which will mean that the courts will give effect to the interpretative provisions to which I have already referred, but it does not make the Convention directly justiciable as it would be if it were expressly made part of our law. I want there to be no ambiguity about that."

³⁸ See news report in the *Daily Telegraph*, 1 November 1996.

³⁹ Labour Party Election Manifesto 1997: *Real Rights for Citizens*, p. 35.

⁴⁰ The Independent Commission on a Bill of Rights in 2010-11 found that three-quarters of those opposed to a Bill of Rights argued that in their view the UK already has a Bill of Rights, namely the Human Rights Act: see its Report, p. 14, para.26; and for an example of this view, see Francesca Klug, *A Bill of Rights: do we need one or do we already have one?* (LSE Law, Society and Economy Working Papers 2/2007).

⁴¹ For commentary see Robert Blackburn and Raymond (Lord) Plant (eds.), *Constitutional Reform: The Labour Government's Constitutional Reform Agenda* (1999).

⁴² The provisions of the Act, which are well-known, are not set out at length here: for full details and documentation (including the legislative text, original form of the bill and explanatory memorandum, accompanying government white paper, and parliamentary debates) see Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (1999), chapter 3.

So in Lord Irvine's view, European human rights had not been implanted in UK domestic law; the UK courts were simply being permitted to give judicial notice of them, and provide remedies themselves in legal actions that could otherwise be taken directly to Strasbourg.

VIII. The Aftermath of the Human Rights Act

The immediate effect of the Human Rights Act was to kill the Bill of Rights debate stone dead for eight years. As an idea and proposal it was barely discussed or mentioned in politics and public discussions at all over this period. The whole attention of the human rights community, and critics of the Act, was focussed on the extent and nature of its impact, and the extensive preparations and changes being made across the legal, political and administrative life of the country.

These preparations and changes were very substantial. They started with the most extensive education and training sessions ever seen for British judges, civil servants and other public officials on the law and working of the ECHR and the new human rights obligations on public authorities to be complied with, which took place over the two-year period between the Royal Assent to the Human Rights Act on 9th November 1998 and its entry into force on 2nd October 2000. The Act was being treated like a Bill of Rights not simply because of the actionable nature of the individual rights in the legislation, but because of the massive organisational changes being made in the UK state, politically as well as legally. Thus to supervise the workings of the Act and strengthen the role of Parliament in the protection of human rights generally, a Joint Committee of both Houses of Parliament on Human Rights was established in late 2000 with terms of reference to consider "matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)",⁴³ as well as to scrutinise and report on proposed remedial orders under section 10 of the Act (which provides a fast-track legislative process similar to statutory instruments to respond to judgments in the UK courts or European Court of Human Rights that a provision of UK law was incompatible with the ECHR and bring it into conformity with their ruling).⁴⁴ Work began on harmonising the various existing equality commissions⁴⁵ with a powerful single body to promote and protect human rights, which became the Equality and Human Rights Commission under the Equality Act 2006.⁴⁶

Then, quite suddenly and unexpectedly, the Bill of Rights debate was reignited by a speech made by the new Conservative leader, David Cameron, on 26th June 2006.⁴⁷ Conservative front-bench opposition to the Human Rights Act in 1997-98, and its criticism of its effects, was now translated into advocacy of a "modern British Bill of Rights and Responsibilities". Mr Cameron argued that the Human Rights Act had made it harder for ministers to protect our security, done little to protect some of our liberties, hampered the fight against crime and terrorism, and helped create a culture of rights without responsibilities: and "the truth is, Labour got us into this mess". He would therefore now be conducting a review of how the nature of Britain's participation in the ECHR could be aligned with the principles and legal effect of the modern Bill of Rights he was advocating.

This represented a considerable political challenge to the Labour government. The Blair administration was exhausted after its efforts over its human rights reform programme, but when Gordon Brown succeeded him as Prime Minister in 2007, he immediately grasped the Bill of Rights agenda as part of his own vision for Britain's constitutional future, and was not going to allow the Conservative Party to steal Labour's moral high ground as the champions of human rights. Only days after he took office, a major new Labour

government reform initiative was published in a green paper, *The Governance of Britain*, on which Brown had been working for months beforehand in the expectation of his accession to the premiership, in which he presented the case for a "British Bill of Rights and Duties".⁴⁸

The tone and substance of the Bill of Rights debate had now changed. As time moved on in the aftermath of 1998, it was the inability of the Human Rights Act to provide an expression of British-ness and national civic values that became exposed as its essential weakness for serving as a genuine Bill of Rights. Having abandoned its strategy of constructing a constitutional Bill of Rights in 1996, a new formulation of Labour policy was required to rebut the Conservatives' unexpected espousal of such a document. Brown's solution was to champion a distinctive notion of British citizenship.⁴⁹ In its section on "Britain's Future: The Citizen and the State", Mr Brown's green paper emphasised the importance of "our common British values", stating that,

"It is important to be clearer about what it means to be British, what it means to be part of British society and, crucially, to be resolute in making the point that what comes with that is a set of values which have not just got to be shared but also accepted. There is room to celebrate multiple and different identities, but none of these should take precedence over the core democratic values that define what it means to be British. A British citizen, playing a part in British society, must act in accordance with these values."⁵⁰

Calling for a fuller articulation of these values, and the ideals and principles that bound our society together, it went on to present its case for a British Bill of Rights and Duties. This reform, the document said, could provide explicit recognition that human rights come with responsibilities and give clarity to a framework for the relationship between citizens, the community, society and the state. In support of this initiative, Lord Goldsmith, a former Attorney General, was despatched to conduct a "Citizenship Review" suggesting ways of promoting rights and responsibilities,⁵¹ and the Ministry of Justice worked on a further discussion paper entitled *Rights and Responsibilities: Developing our Constitutional Framework*.⁵²

⁴³ In practice this has been treated by the Committee as a role to scrutinise every government Bill for its compatibility with human rights, not only those described in the ECHR but common law fundamental rights and liberties and human rights contained in other international obligations of the UK, and to conduct occasional thematic inquiries: see its website <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee>

⁴⁴ House of Commons Standing Orders (Public Business), February 2016, SO 152(B)(2).

⁴⁵ Commission for Racial Equality, Equal Opportunities Commission, and Disability Rights Commission.

⁴⁶ Now replaced by the Equality Act 2010, which see for its extensive terms of reference (including investigatory and enforcement powers).

⁴⁷ David Cameron, "Balancing Freedom and Security: A Modern British Bill of Rights" (Centre for Policy Studies, 2006): see further below at p. 318.

⁴⁸ Ministry of Justice, *The Governance of Britain*, Cm. 7170 (2007).

⁴⁹ Interestingly there were precedents for this suggesting a tendency for Prime Ministers to become fond of ideas of citizenship: see Robert Blackburn (ed.), *Rights of Citizenship* (1993) especially its Introduction on John Major's citizenship initiative.

⁵⁰ Ministry of Justice, *The Governance of Britain*, Cm. 7170 (2007), paras. 195-196.

⁵¹ Published as *Citizenship: Our Commons Bond* (2008).

⁵² Cm. 7577 (2009). On the academic debate, see Stephan Parmentier, Hans Werdmolder and Michael Merrigan (eds.), *Between Rights and Responsibilities: A Fundamental Debate* (2016).

Labour Party thinking on the subject was by now becoming increasingly convoluted⁵³ and intellectualised, infused with some earlier communitarianism philosophy⁵⁴ that had been influential in the early days of Tony Blair's administration, helping him shape his Third Way rhetoric and the idea of New Labour being a departure from the traditional socialism of the Labour Party and divide between the two main British political parties. Gordon Brown himself had been an academic historian prior to entering politics, with a special interest in the Scottish enlightenment. In a speech on *Liberty* he gave at the University of Westminster in 2007, Mr Brown gave a romantic account of British ideas on freedom ever since Magna Carta saying, "a passion for liberty has determined the decisive political debates in our history" and that it was time to "write a new chapter in our country's story of liberty" through the debate he was launching on a Bill of Rights and Duties.

However, the main stumbling block to any formulation of these ideas into government legislation was simply dissent and antagonism within the Labour Party and Cabinet to the idea of strengthening the UK judiciary. The Labour Party has a long tradition of suspicion of the judiciary and mistrust over whether they can act impartially, being perceived as a bulwark of the establishment, perpetuating conservative-minded values in their rulings. To a large extent this is part of party folklore stemming from the early days of the trade union movement which created the Labour Party, when a series of legal actions by private companies and employers went against them in the courts, such as *Lyons v Wilkins* (1899)⁵⁵ and *Taff Vale* (1901).⁵⁶ A speech in Washington by the then Justice Secretary Jack Straw, who was given the ministerial brief to develop a Bill of Rights, illustrates this hesitancy on how such a document could ever work if not given entrenched legal and judicial force.

"In seeking to bring greater clarity and status to the relationship between the citizen, the state and the community, we in the UK have to be constantly mindful of the scope and extent of their justiciability... The formulation of such a Bill is not a simple binary choice between a fully justiciable text on the one hand, or a purely symbolic text on the other... A Bill of Rights and Responsibilities could give people a clearer idea of what we can expect from the state and from each other, and provide an ethical framework for giving practical effect to our common values. In an enabling state, in a democratic society, it is far more than the law which binds us together."⁵⁷

In the event, lack of agreement within the Labour Cabinet sabotaged any outcome, and Mr Straw's proposed Bill that his civil servants had spent considerable time on remained unpublished and was abandoned.

Meanwhile, prompted by the government's 2007 initiative, the Joint Committee on Human Rights in Parliament carried out its own inquiry on a Bill of Rights in the 2007-08 session, recommending the enactment of a "Bill of Rights and Freedoms".⁵⁸ It rejected Labour and Conservative proposals for the inclusion of duties and responsibilities, and believed that a number of individual rights beyond those in the ECHR should be included, such as jury trial and children's rights. On its legal effect, while the Committee did not believe the courts should have the power to strike down legislation, it believed that like the Human Rights Act the courts should interpret legislation whenever enacted for conformity with the Bill of Rights unless Parliament decided to pass incompatible legislation and made clear its intention to do so.

IX. Current Conservative Plans for a Bill of Rights

While Gordon Brown as Prime Minister sought to retrieve the idea of responsibilities of citizenship back from David Cameron, he kept clear of the European

dimension of the Bill of Rights debate. However it was this that the Conservatives addressed in a major way, tapping into a powerful impulse of Euro-scepticism in British political life, especially on the populist right of his party. Between Mr Cameron's speech in 2006 and the proposals of his party published in 2014, a mounting campaign took place to discredit the authority of the European Court of Human Rights in the UK, both in the influence it had upon UK judicial rulings under section 3 of the Human Rights Act, and upon the binding effect of its judgments when the Strasbourg court found the UK to be in violation of the ECHR.⁵⁹ Thus in 2008 the then shadow Justice Secretary Nick Herbert belittled the work of the Court for making a ruling that prisoner's human rights had been violated because of a blocked toilet in his cell,⁶⁰ arguing that dealing with matters that were essentially ones of administrative efficiency diminished the status of the ECHR and Court, which should be reserved for much larger and heinous human rights abuses.⁶¹ The Conservatives, he added, wanted "a settlement that restrains the influence of Strasbourg case law, and truly allows the development of a distinctive jurisprudence on human rights".

Formal proposals of the Conservative Party published in 2014⁶² then advocated the complete repeal of the Human Rights Act that incorporated the ECHR into domestic law and required the UK judiciary to take into account the judgments of the European Court of Human Rights in their interpretation of statutes and development of the common law.⁶³ However, ironically these Conservative plans then stated that the articles of the ECHR would be taken as the basis for the British Bill of Rights:

"The key objectives of our new Bill are: Repeal Labour's Human Rights Act. Put the text of the original Human Rights Convention into primary legislation. There is nothing wrong with that original document, which contains a sensible mix of checks and balances alongside

⁵³ Another complication was the need to harmonise any proposals with the work being done to construct a Bill of Rights for Northern Ireland under the Belfast (Good Friday) Agreement 1998: see Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland* (December 2008).

⁵⁴ See Amitai Etzioni, *The New Golden Rule* (1996), and *The Responsive Community* journal.

⁵⁵ *J. Lyons and Sons Ltd v. Wilkins* [1899] 1 Ch. 255.

⁵⁶ *Taff Vale Railway Co v. Amalgamated Society of Railway Servants* [1901] UKHL 1.

⁵⁷ Jack Straw, "Modernising the Magna Carta", 13 February 2008, George Washington University.

⁵⁸ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, HL (2007-08) 165. See also the parliamentary debate on a Bill of Rights: *Commons Hansard*, 25 June 2009, col 307WH.

⁵⁹ On parliamentary opinion at this time see *Commons Hansard*, 19 February 2007, col. 68-124 (debate on Human Rights).

⁶⁰ *Peers v. Greece* (19 April 2001) and the series of subsequent cases on detention conditions and treatment of prisoners, including *Kalashnikov v. Russia* (15 July 2002, 23 HRLJ 378 (2002)) and *Modârca v. Moldova* (10 May 2007). See also the views of former Conservative leader Michael Howard in his article in the *Daily Telegraph*, "Britain can reclaim its human rights laws" (3 October 2014), in which he argues the European Court of Human Rights has brought the concept of human rights "into disrepute" and "the way in which the ECHR has been interpreted is far removed from its founders' intentions... We disagree with the way that the courts both here and in Strasbourg treat the Convention document as a 'living instrument'".

⁶¹ Nick Herbert, "Rights without responsibilities – a decade of the Human Rights Act", Lecture at the British Library, for the British Institute of Human Rights, 24 November 2008.

⁶² Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (2014).

⁶³ Human Rights Act 1998, s.3.

the rights it sets out, and is a laudable statement of the principles for a modern democratic nation.”

Accompanying the Bill would be “clarification” of the Convention rights, reflecting “a proper balance between rights and responsibilities... This will ensure that they are applied in accordance with the original intentions for the Convention and the mainstream understanding of these rights”. In other words, the legislation enacting the Bill of Rights would have supporting sections giving different levels of detail in definition, meaning and tests to be applied by the UK courts in their determination of claims of human rights violation.⁶⁴ The Conservative ideas are that the Bill of Rights would “limit the use of human rights laws to the most serious cases... and there will be a threshold below which Convention rights will not be engaged, ensuring UK courts strike out trivial cases”.

As mentioned above, senior Conservatives have expressed a similar attitude to the working of the European Court of Human Rights in applying the ECHR, so that it should limit its intervention to the most serious violations of human rights. It has been argued that the Court’s doctrine of “margin of appreciation” should be widened for national systems, and has sought to diminish the doctrine that the ECHR should be interpreted by the Court as a “living instrument”,⁶⁵ going beyond the scope and limits envisaged by its founding fathers. These views were expressed at the Brighton Conference of the Council of Europe’s Committee of Ministers in April 2012, leading to protocols 15 and 16, and the formal inclusion of a statement on subsidiarity being inserted into the preamble of the Convention.⁶⁶ There have been plans to negotiate fundamental reform of the ECHR so that rulings of the Court are advisory only, and even threats to withdraw from the ECHR altogether, usually following high-profile Strasbourg judgments against the UK, such as in the *Hirst* case on prisoners’ voting rights.⁶⁷ The 2014 Conservative Party policy document proposed to “end the ability of the European Court of Human Rights to force the UK to change the law” and “every judgment that UK law is incompatible with the Convention will be treated as advisory and we will introduce a new parliamentary procedure to formally consider the judgment. It will only be binding in UK law if Parliament agrees that it should be enacted as such.”⁶⁸ In a speech in central London in spring 2016 when she was Home Secretary, Theresa May, said,

“The ECHR can bind the hands of parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals – and does nothing to change the attitudes of governments like Russia’s when it comes to human rights... So regardless of the EU referendum, my view is this: if we want to reform human rights laws in this country, it isn’t the EU we should leave but the ECHR and the jurisdiction of its court.”⁶⁹

However, since her accession to the premiership on 13th July 2016, following David Cameron’s resignation in response to the EU referendum result, Theresa May and her new Conservative administration have made it clear that they do not propose or intend to leave the ECHR.⁷⁰ Elizabeth Truss, the new Justice Secretary, confirmed this position when she gave oral evidence to the House of Commons Justice Committee on 7th September 2016. This is to be greatly welcomed, for withdrawal from the ECHR would be tantamount to repudiating the UK’s role and partnership in the historic post-1945 commitments on universal human rights and their guarantee by international law.

The question of UK withdrawal from the ECHR has been an important point of debate following the referendum vote to leave the EU, and although there might seem to be consistency in doing so because of Conservative ideas of freedom from European laws and institutions

(quitting the Council of Europe along with the EU), in reality the Council of Europe will now become a primary international vehicle for diplomacy across the European states, and an asset to the UK government in foreign policy terms that outweighs the occasional and infrequent irritant of an adverse ruling in the European Court of Human Rights. On the Conservative administration’s current plans for a British Bill of Rights to replace the Human Rights Act, at the time of writing⁷¹ the new Justice Secretary has said little in terms of detail (“the British Bill of Rights will protect our rights but in a better way”), and made it clear that the legislation will still take some time to design and prepare (“clearly there would need to be very thorough consultation”).⁷²

X. Britain’s Constitutional Dilemmas

It is evident from what has been written above that modern British thought on a British Bill of Rights is far from uniform among those who support it. The factors persuading supporters of its merits, or its opponents of its demerits, have shifted with changing political circumstances over the past five decades, and today there are still conflicting ideas and pressures behind the proposal. Like most constitutional issues, it cannot be categorised as a Right-Left subject dividing the parties, even if particular factors at any given moment in time are, and have been, more persuasive to Conservatives, the Labour Party, and the minor parties.⁷³ Currently attitudes towards Europe are pivotal in the minds of most Conservatives, even if their party is divided on membership of both the EU and the Council of Europe, but both main parties appear to agree on the need to include a catalogue of duties and responsibilities in a Bill of Rights if there were to be one. Both parties are resistant to the idea of a Bill of Rights

⁶⁴ For a Bill of Rights proposal of this nature, reducing the influence of judgments of the European Court of Human Rights in matters of judicial interpretation in the UK, and removing their binding effect altogether, along with those of the articles of the ECHR and decisions of the Committee of Ministers, on any person or public authority, see Human Rights Act 1998 (Repeal and Substitution) Bill, HC (2012-13) 31.

⁶⁵ See *Tyrer v. United Kingdom* (25 April 1978) that inaugurated the doctrine into the jurisprudence of the European Court of Human Rights.

⁶⁶ “The High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation...”

⁶⁷ *Hirst v. United Kingdom* (No. 2) (6 October 2005), 30 HRLJ 204 (2009-2010).

⁶⁸ Conservative Party, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (2014), p. 6.

⁶⁹ Reported in the *Guardian* newspaper, 25 April 2016.

⁷⁰ At her Conservative leadership launch conference on 30th June 2016 Theresa May answered a media question on the subject, stating that she would not campaign to leave the ECHR, on the grounds that it is an issue that divides people and currently carries no parliamentary majority.

⁷¹ 9 September 2016.

⁷² House of Commons Justice Committee, Oral evidence: The work of the Secretary of State, 7 September 2016, HC (2016-17) 620.

⁷³ The Liberal Democrats have been most consistent in their thinking and support for a Bill of Rights, supporting its adoption as apart of a written UK constitution as their long-term objective: see policy papers reproduced in Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (1999), docs. 93, 94.

being enacted in a way that substantially strengthens the power of the judiciary, with attitudes within the Labour Party largely affected by suspicions of social bias in the British judiciary, and those within the Conservative party attitudes affected by antagonism to the influence of European judges at Strasbourg and Luxembourg. There is ambiguity in the rhetoric of “parliamentary sovereignty” employed on all sides, particularly in being alternately employed as a constitutional doctrine asserting the primacy of democratically-elected politicians over unelected judges, or national supremacy of British law over European and international courts and treaty obligations.

The British political system tolerates a remarkable degree of ambiguity, uncertainty and contradiction in its constitutional arrangements. This goes much deeper than institutional matters such as retaining a hereditary Monarchy in a political democracy, and maintaining a parliamentary Second Chamber with ninety-two hereditary peers, with no agreement on what its fundamental role in the constitution should be. Some maintain that Britain has now reached a tipping point or crisis⁷⁴ in its political arrangements, arising from the same kind of conflict of thought that currently surrounds the Human Rights Act and plans for its replacement by a British Bill of Rights. The year 2016 has been singularly significant and traumatic in this respect, and never in most people’s lifetime has the politics and government of Britain been in such a state of turmoil, following the electoral successes of the Scottish Nationalist Party pressing for Scotland to secede from the Union, the outcome of the June referendum that the UK should leave the EU, and conflict within the Labour Party over the selection of its leader and Prime Minister-in-waiting.

Both a cause of, and solution to, this malaise is the need for a codified, written UK constitution.⁷⁵ Britain’s political problems are largely due to confusion in the basic principles of our constitution, one famously “unwritten” – which for all intents and purposes means the country does not have a one at all, and certainly not one which ordinary people can comprehend or buy a copy of to see what the rules and procedures are by which we are governed. A primary reason for a written constitution in any political democracy is to clarify and establish democratic authority in the state, articulating who is sovereign for the purpose of determining major public policy decisions and the law. Much of the controversy over the EU referendum result has been due to disagreement on whether it is, or should be, the elected House of Commons (where a clear majority of members, even among Conservatives, favours remaining in the EU) or a majoritarian plebiscite (that narrowly voted to leave) that is best equipped in terms of democratic principle and informed judgement for settling such a fundamental matter of state. Furthermore, the unwritten constitution means there is no special process for changing fundamental matters of state, and David Cameron only ever conceived a referendum on EU membership as a political tactic to silence backbench Conservative Europhobes and outflank the UK Independence Party. His predecessor John Major’s method of calling confidence motions in his party and the House of Commons for his government’s policies was the appropriate constitutional method for this purpose. In the event, the referendum spectacularly backfired on the Conservative leader and unless a proper constitutional amendment process is soon established by which the UK prepares and implements major constitutional change, it has created the most terrible precedent for future populist governments.⁷⁶

The incoherence flowing from existing arrangements extends to the muddle in which Britain now chooses its Head of Government. Under a US-style separation

of powers the electorate directly choose its President, who then requires the consent of a separately elected Congress to enact laws and approve major public policy decisions. By contrast under the UK system of parliamentary government, with a fused executive/legislature membership whose virtue rests precisely on the direct personal accountability and relationship of a Prime Minister to the House of Commons, the successive rule changes of the political parties since the 1980s handing over the choice of leader – and therefore Prime Minister (or Leader of the Opposition as Prime Minister-in-waiting) – to an extra-parliamentary electorate of those paying a party subscription fee confuses these two systems, emphasising the negative elements of each. It dilutes parliamentary control of the executive, and provides an incomplete method of popular selection of the Head of Government. The time has come for Britain to enact a constitution that clearly provides that its Prime Minister is chosen from and by the membership of the House of Commons as expressed in confidence motions, or else the office and tenure of Prime Minister is to be removed from Parliament and its occupant chosen in a separate process by the whole electorate in quasi-presidential fashion.⁷⁷

The events of 2016 have therefore exposed some fundamental flaws in British political democracy, and strengthened the case for a written constitution. A documentary constitution would provide a coherent doctrine of political authority in the state, a declaration of principle on the position of the UK in the international community, a process for major political and constitutional change, and be the natural home for a home-grown Bill of Rights that set out the rights and freedoms of its citizens.

XI. A Prescription for a British Bill of Rights⁷⁸

In other words, a Bill of Rights would be of great benefit to the UK and its people, but its enactment should form part of a wide-ranging and comprehensive review of the country’s political and constitutional system. The precise nature, status and content of the document should be

⁷⁴ See Vernon Bogdanor, *The Crisis of the Constitution* (Constitution Society, 2015).

⁷⁵ The House of Commons Political and Constitutional Reform Committee conducted an inquiry on this subject in the 2010-15 Parliament, for which the author served as Special Counsel: see *A New Magna Carta?*, HC (2014-15) 463; also Robert Blackburn, “Enacting a Written Constitution for the United Kingdom”, *Statute Law Review* (2015), pp. 1-27.

⁷⁶ On constitutional legitimacy and referendums, see Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (2012).

⁷⁷ For discussion see Graham Allen MP, *The Last Prime Minister: Being Honest About the UK Presidency* (2002).

⁷⁸ There have been a series of proposed blueprints on how a British Bill of Rights might be constructed, including John Macdonald QC, *Bill of Rights* (1969); Peter Wallington and Jeremy McBride, *Civil Liberties and a Bill of Rights* (1976); Joseph Jaconelli, *Enacting a Bill of Rights: The Legal Problems* (1980); Institute for Public Policy Research, *A British Bill of Rights* (1990); National Council for Civil Liberties, *A People’s Charter* (1991); Joint Committee on Human Rights, *A Bill of Rights for the UK?*, HL [2007-08] 165; Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (2012); and ones as part of a draft Written Constitution including Tony Benn, *Commonwealth of Britain Bill*, HC [1990-91] 161; Richard Gordon, *Repairing British Democracy: A Blueprint for Constitutional Change* (2010); and Robert Blackburn, “Mapping the Path towards Codifying – or Not Codifying – the UK Constitution”, in House of Commons Political and Constitutional Reform Committee, *A New Magna Carta?*, HC (2014-15) 463.

constructed in a manner that is compatible with those distinctive elements of traditional British constitutionalism that we wish to retain, but harmonise with other recent, present or imminent changes taking place across the political spectrum. Such a document would have a strong symbolic value as an expression of the rights and freedoms of all our citizens across the four nations of the UK, and become a key point of reference for individuals and groups in dealing with state agencies, and for politicians and public office-holders in carrying out their work. Like the Human Rights Act at present, it would provide a legal remedy for individual grievances against public bodies but be more extensive in its scope, extending it expressly to private and commercial organisations. It would provide an opportunity to articulate the progressive values that our society and people seek to espouse, more closely attuned to our national circumstances than those drafted for the international purposes of the United Nations and Council of Europe.

The existing traditional and core civil liberties long recognised in Britain would be retained, reflecting the emphasis the country's culture has long placed on tolerance and free speech, absence of arbitrary official conduct, fairness and due process in the application of the law, and equality of treatment. These principles should be prescribed by the Bill of Rights in a manner compatible with and complementary to our international obligations, notably the lowest common denominators set out in the Universal Declaration and ECHR. The real challenge for those drafting the Bill of Rights – and its most interesting intellectual aspect – will be to identify and articulate those further rights and freedoms which are, or shortly will be, of fundamental importance to the dignity and quality of human life. In order to express these principles, it is essential to focus on the problems and threats that lie ahead in the future.

For example, two of the greatest threats to our freedoms, dignity, and quality of life, are posed by runaway new technologies and the potential for their misuse, and by environmental degradation. Coupled with this is the fact that those who govern and control our lives in both the state and commercial sectors are increasingly institutionally motivated by factors of administrative and financial convenience. In some cases, human rights already recognised need considerable further articulation and adaptation in the UK. The field of equality and non-discrimination should extend its range to matters of genetic make-up. Freedom from degrading treatment should be elaborated on in diverse areas such as care of the elderly and surveillance of employees. The right to life should address issues of human cloning and voluntary euthanasia of the terminally ill. In other cases, new principles must be articulated, for example providing standards of environmental impact by which commercial and governmental bodies must operate. The precise drafting or wording of particular rights may find lessons or models to follow from recent national and international bills of rights, including for example the enlightened South African Bill of Rights forged as part of its process of national reconciliation.

In my view, the British Bill of Rights must not be a Bill of Rights *and Duties* or *Responsibilities*, as the last Labour government and Conservative proposals have suggested.⁷⁹ It should not seek to instruct citizens by way of a list of state approved public responsibilities owed to society and the state. There are already responsibilities and obligations inherent in the concept of human rights, expressed for example in the provisos to many of the articles of the ECHR. These public interest factors are the other side of the same coin that stipulates our fundamental human rights and freedoms. The key

question here is on what side of the coin do you wish to place the primary emphasis? In a free society the emphasis must be on the side of the rights and freedoms of the individual. If the government wants to promote ideas or obligations of civic responsibility and active citizenship, especially if they are to be compulsory ones, this must be done by way of some document or initiative other than through a new British Bill of Rights. Any government seeking to include such prescribed duties in a Bill of Rights would need to have its proposals very carefully scrutinised by the Joint Committee on Human Rights and other civil liberties watchdogs.

As an expression of the British state about its common values, any British Bill of Rights should uniformly bind the three legal systems operating in the UK (England and Wales, Scotland, and Northern Ireland) under the final jurisdiction of the country's Supreme Court. Statutory provisions should expressly state that the administrative and legislative measures of the devolved parliaments and assemblies must be compatible with the British Bill of Rights. Its content and way it is interpreted and applied should also take into account the UK's international obligations: regardless of whether the UK leaves the European Union or changes in the status of the ECHR and rulings of the European Court of Human Rights in UK domestic law, such harmonisation of national with international treaties on human rights and democracy remains increasingly important as technological, social, financial, commercial and environmental pressures drive the countries of the world closer together to address common problems and the need to avoid areas of potential conflict.

A British Bill of Rights of a genuinely constitutional nature will need to address the balance of powers between executive, Parliament and judiciary, and establish its precise status and priority in law. As suggested above,⁸⁰ in the writer's view a scheme of semi-entrenchment similar to that of the Canadian Charter of Rights and Freedoms would be preferable. However, parliamentary sovereignty purists at Westminster are likely to balk at any idea of entrenchment, though it might prove more acceptable if enacted as part of a written UK constitution. For this reason, at least initially, judicial review of primary legislation under the Bill of Rights might be confined to a non-legal declaration of incompatibility, similar to the scheme provided for in the Human Rights Act.⁸¹

A further complexity to disentangle will be to reach agreement on which human rights are capable of judicial enforcement from those that are not. Most jurists recognise that the freedoms and rights most capable of being actionable and enforceable through the courts are those of a civil and political nature, similar or closely associated to the type of rights in the European Convention. However, even if human rights relating to the workplace, housing, social security, health and the like are accepted as not being amenable to the legal process of judicial enforcement under a Bill of Rights, consideration should be given to drafting a statement of social and economic rights to serve as an authoritative declaration of principles on which government policy should be conducted. This declaration of social and economic rights could appear in a separate part of the Bill of Rights, making reference also to the

⁷⁹ See for example Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework*, Cm 7577 (2009); and comments by the parliamentary Joint Committee on Human Rights, *A Bill of Rights for the UK?*, HC (2007-08) 150-1, chapter 8.

⁸⁰ See p. 314.

⁸¹ S. 4.

relevant international covenants and charters to which the UK is a treaty signatory, such as the Council of Europe Social Charter and the UN Covenant on Economic, Social and Cultural Rights. The value of this declaration would therefore not lie in the realm of actionable legal remedies, but as a point of public and parliamentary reference and to assist in judicial interpretation of unclear statutory measures. It might also form part of the responsibilities of the Commission for Equality and Human Rights in preparing advisory reports on the compatibility of legislative and administrative developments with the social and economic principles expressed in the Bill.

On how a British Bill of Rights should be designed and prepared, it is of concern that particularly since 2001 governments have taken upon themselves a forceful self-asserting role with respect to constitutional change, regularly driving such measures hastily through both Houses of Parliament under a three line whip.⁸² The truth is that governments of all persuasions have a vested interest in moulding our constitutional arrangements in a manner that suits their own political, financial, and administrative convenience. This explains why some current opposition to a Bill of Rights comes from surprising quarters among the civil liberties lobby. For whilst in principle they may be enthusiastic supporters of a Bill of Rights, in practice they are worried the government will misuse its legislative power to construct a measure that actually facilitates draconian activities by the state, or removes the country's commitment to the international protection of human rights.⁸³ Nothing is more dangerous than corrosions of liberty dressed up as constitutional safeguards. For this reason, the draft legislative blueprint for a British Bill of Rights would be best drawn up by an independent committee of legal experts, one that commands the confidence of the government and political parties represented in Parliament. This would be of a different nature to the Independent Commission on a Bill of Rights in 2011-12 whose composition of highly opinionated members across the political spectrum with wide terms of reference "to investigate the creation of a UK Bill of Rights" was virtually guaranteed not to co-operate or end with a strong consensus of recommendations.⁸⁴ The key elements of the Bill to be drafted by a new Commission is best settled politically by the government in advance, leaving it to the Commissioners to exercise a legislative drafting exercise in similar manner to the Law Commission. Its recommendations and draft Bill of Rights should then be presented directly to Parliament.

XII. Conclusions

The proposal for a British Bill of Rights from the Conservative government will take time to be developed in its detail, and go through the necessary process of debate, scrutiny and approval in both Houses of Parliament. A preliminary green and/or white paper on the form of the proposed legislation is likely to produce a torrent of responses from politicians, lawyers, academics and the public during the consultation process conducted by the Justice ministry, and by the inquiries conducted by parliamentary committees involved.⁸⁵ The new Justice Secretary, Elizabeth Truss, on 7th September this year confirmed to the parliamentary Joint Committee on Human Rights that there will be a "very thorough consultation".⁸⁶

This article has sought to provide a better understanding of the Conservative proposals by analysing the shifting context, pressures and arguments in the debate on a British Bill of Rights as they have evolved over the past

fifty years. It is a debate that exposes some fundamental truths about the character of constitutional law in Britain today, particularly the unsatisfactory nature of its policy and reform making process, and the ambiguities in its theoretical underpinning. The UK has reached a critical stage in its constitutional development, and the solution to addressing many of its long-running problems – such as on the composition of the House of Lords, on an overarching framework for the union of England, Scotland, Wales and Northern Ireland, on placing the prerogative powers (including war powers) on a statutory basis, on expressing the country's relationship with Europe and international community, and on regulating the constitutional law making process itself – is to confront and deal with them in combination. All this implies that the future of human rights reform in the UK would be best conducted through a genuinely constitutional Bill of Rights that formed part of a written codified British constitution.⁸⁷

Author's Note

This article was prepared in honour of the 70th birthday and retirement of Paul Mahoney as the UK Judge of the European Court of Human Rights. Its analysis covers a period of time in British political and constitutional life almost exactly the same as that of the career of Judge Mahoney himself, the greater part of which he devoted to extraordinary service at the Council of Europe and for the cause of universal human rights.

⁸² For a study of the current process of constitutional law reform in the UK, see Robert Blackburn, "Constitutional Amendment in the United Kingdom", Ch. 18 in Xenophon Contiades (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (2012), pp. 359-388. See also House of Lords, *The Process of Constitutional Change*, HL (2010-12) 177.

⁸³ See Philippe Sands and Helena Kennedy, "In Defence of Rights", *London Review of Books*, 3 January 2013.

⁸⁴ See Report of the Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, December 2012. As the Commission itself noted in its introduction, "It has been composed, and we must presume deliberately composed, of people who already had well defined views on the protection of human rights." Acrimony in its early proceedings led one of the Commissioners, Michael Pinto-Duschinsky, to resign. The remaining nine members of the Commission "all interpreted our terms of reference as treating the UK's continuing adherence to the European Convention on Human Rights as a 'given'" (p. 6): this was in line with the then Conservative Justice Secretary Kenneth Clarke QC ("There is not the faintest chance of the present Government withdrawing from the convention on human rights", *Commons Hansard*, 13 September 2011, col. 880) and the then Conservative Attorney General Dominic Grieve QC (see *Commons Hansard*, 10 February 2011, cols. 493 f.; also "Why Human Rights Should Matter to Conservatives", *Political Quarterly* (2015), 62), which are at variance from those of the new Prime Minister, Theresa May (see above p. 319). A dissenting minority report by two Commissioners opposing a Bill of Right in existing circumstances was included in the published Report that otherwise supported the idea.

⁸⁵ There are likely to include the Commons Justice Committee, the Joint Committee on Human Rights, and the Lords Constitutional Committee, as well as (on the final Bill itself) a Commons Public Bill Committee.

⁸⁶ House of Commons Justice Committee, Oral evidence: The work of the Secretary of State, 7 September 2016, HC (2016-17) 620.

⁸⁷ For discussion see Robert Blackburn, "Enacting a Written Constitution for the United Kingdom", *Statute Law Review* (2015), pp. 1-27; and House of Commons Political and Constitutional Reform Committee, "A New Magna Carta?", HC (2014-15) 463.

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Judicial activism and judicial self-restraint in the EurCourtHR: Two sides of the same coin

Colloquy in Honour of Paul Mahoney

on the occasion of his 70th birthday, organised on 9 September 2016 in Strasbourg
in the Human Rights Building by the Human Rights Law Journal (HRLJ)

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